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Settlement of commercial disputes

UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976

Note by the Secretariat

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Introduction

1. At its thirty-ninth session (New York, 19 June – 7 July 2006), the Commission agreed that Working Group II (Arbitration and Conciliation) should give priority to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules"). The Working Group commenced its work on a revision of the Rules at its forty-fifth session (Vienna, 11-15 September 2006).

2. It has been considered appropriate to inform the Commission about the activities of the Secretary-General of the Permanent Court of Arbitration ("the PCA Secretary-General") under the Rules, including to facilitate the current discussions on the revision of the Rules. The PCA Secretary-General has communicated to the Secretariat on 16 November 2006 a report providing a summary of its activities under the Rules since 1976.

3. It is recalled that articles 6, 7 and 12 of the Rules entrust the PCA Secretary-General, upon the request of a party, to designate an appointing authority for the purpose of appointing members of an arbitral tribunal and ruling on challenges to arbitrators. The PCA Secretary-General may also assist the parties in fixing the arbitrator's fees and the arbitral tribunal in relation to deposit for costs in accordance with articles 39 and 41 (respectively) of the Rules.

4. The report of the PCA Secretary-General on its activities under the Rules is reproduced in substance below.

Report of the PCA Secretary-General on its activities under the UNCITRAL Arbitration Rules

1. Growth in the PCA appointing authority cases since 1976

5. Since the adoption of the Rules, the PCA Secretary-General has received requests to designate, or to act as, an appointing authority in over 270 cases (see attached annex). Twenty-five institutions and over twenty individuals have been designated by the PCA Secretary-General to act as appointing authorities. The most common request is for the designation of an appointing authority to appoint a second arbitrator on behalf of a defaulting respondent.

6. The significant growth in requests in recent years[1] is partially attributable to arbitrations commenced under bilateral and multilateral investment treaties.[2] Investment treaty matters have also contributed to the relatively high percentage of cases (approximately 40 per cent) in which a request was received where at least one State or State entity was involved. The PCA has also received an increasing number of requests to provide full administrative support in arbitrations under the Rules.

2. The procedure followed by the PCA Secretary-General in designating appointing authorities[3]

7. The PCA Secretary-General seeks to make the procedure as efficient as possible, and generally designates an appointing authority within two weeks of receipt of a request that contains all required documents.[4]

8. When the PCA Secretary-General receives a request to designate an appointing authority, he reviews the documents submitted to ensure that, on a prima facie basis, he is competent to act. Once satisfied, the PCA Secretary-General invites the respondent to provide its comments on the claimant's request within five to ten working days. After the respondent's comments have been received or the time limit to submit comments has expired, the PCA Secretary-General designates the appointing authority.

9. In making that designation, the PCA Secretary-General generally takes into account the following factors: (i) the comments of the parties; (ii) the nationalities of the parties and the regional or global character of the dispute (in order to select a neutral appointing authority); (iii) the place of arbitration, if specified; (iv) the language of the arbitration, if specified; (v) the complexity of the case and the amounts claimed; (vi) the fees charged by the prospective appointing authority; and (vii) the anticipated reaction time of the appointing authority. The PCA Secretary-General also ascertains the independence and impartiality of the appointing authority prior to designation.

10. The PCA Secretary-General emphasizes to the appointing authority that the designation is "for all purposes under the UNCITRAL Arbitration Rules" and therefore covers appointing arbitrators (articles 6 and 7), deciding challenges (article 12), and assisting with issues relating to arbitrator fees (article 39) as well as costs for deposits (article 41).

3. Noteworthy cases and trends

Replacement of appointing authorities

11. There has been an increasing number of requests to the PCA Secretary-General for the replacement of previously agreed appointing authorities pursuant to articles 6 (2) and 7 (2) (b) of the Rules.

12. For example, in one case, the claimant requested that the PCA Secretary-General replace the appointing authority on the ground of bias in favour of the respondent. Under the Rules, the only grounds for removal of an appointing authority are for failure or refusal to act. The PCA Secretary-General found that he was not empowered to remove the appointing authority on the ground advanced by the claimant and its request was denied. In another case, the claimant requested that the PCA Secretary-General replace an appointing authority on the ground that it had failed to act within the time limit provided for under article 7 (2) (b) of the Rules. The PCA Secretary-General examined the case and discovered that the claimant had not complied with article 8 (1) of the Rules, which required a party to provide an appointing authority with a copy of specified documents. The PCA Secretary-General's view was that compliance with article 8 (1) was a condition precedent to the replacement of an appointing authority and the request was denied.

13. In yet another case, the claimant requested that the PCA Secretary-General designate a replacement appointing authority on the ground that the agreed appointing authority had failed to act. The agreed appointing authority, a national court judge, explained that the question of arbitrability of the dispute was pending before national courts and she declined to act until the issue was resolved. The PCA Secretary-General interpreted this as a refusal to act under the Rules, and designated a replacement appointing authority.

"Pathological" and problematic clauses

14. The PCA Secretary-General has received a number of requests to designate an appointing authority pursuant to arbitration clauses that are unclear or contain obvious drafting errors.

15. In one case, the claimant requested that the PCA Secretary-General designate an appointing authority to appoint the second arbitrator on behalf of a defaulting respondent. The arbitration clause provided that "[a]ny dispute or difference between the Parties [would be] referred to and determined by arbitration in The Hague under the International Arbitration Rules". The respondent, when invited by the PCA to comment, objected to the claimant's request on the ground that the clause was too vague to justify the competence of the PCA. The respondent also refused to agree to the application of the Rules. After reviewing the matter, the PCA Secretary-General informed the parties that he was not satisfied, on the basis of a prima facie screening of the documentation submitted by the parties, that he was competent to act.

16. The PCA Secretary-General has also been requested to designate an appointing authority in cases where the arbitration clause contains a reference to an administering body, and one of the parties objects to that administering body acting as the appointing authority. In such cases, the usual practice of the PCA Secretary-General is to designate the administering body referred to in the clause as the appointing authority, on the basis that the parties' prior agreement was to choose that administering body.[5]

17. On one occasion, the PCA Secretary-General was requested to designate an appointing authority by a claimant who sought to invoke an arbitration clause in a bilateral investment treaty ("BIT") between the respondent State and a third State by relying on the most favoured nation clause therein. The BIT provided for arbitration under the Rules and specified an appointing authority. The claimant was directed by the PCA Secretary-General to approach the appointing authority specified in the BIT regarding constitution of the tribunal.

4. Fee consultation

18. The PCA Secretary-General has assisted parties in reaching agreements with arbitrators with respect to their fees. It has coordinated a variety of fee arrangements, e.g., having the parties and arbitrators agree on fixed fees or to the fee schedule of an arbitral institution.

19. The PCA Secretary-General has also facilitated fee arrangements where the arbitrators charged different hourly rates. In some cases, co-arbitrators charge one hourly rate and the presiding arbitrator another. In one case, the PCA Secretary-General helped coordinate an arrangement whereby each arbitrator charged an

individual hourly rate comparable to what they would normally charge in their home jurisdiction – such rates being significantly different from each other. The advantage of this approach is to avoid that all arbitrators charge at the highest rate.

Notes

[1] In 2006, the PCA has received to date twenty-four requests.

[2] In 2005, seven requests for appointing authority services were received in connection with arbitrations commenced under investment treaties; sixteen requests were received in disputes arising under contracts.

[3] The PCA has published (1) Procedural Guidelines for Requesting Designation of an Appointing Authority by the PCA Secretary-General under the UNCITRAL Arbitration Rules; (2) PCA Procedures for Cases under the UNCITRAL Arbitration Rules; and (3) Model Clauses for PCA Services under the UNCITRAL Arbitration Rules (see http://www.pca-cpa.org/ENGLISH/BD/ under the heading "UNCITRAL Rules and Procedures").

[4] The documents required are: (1) a copy of the arbitration clause or agreement establishing the applicability of the UNCITRAL Arbitration Rules; (2) a copy of the Notice of Arbitration served upon the respondent, as well as the date of such service; (3) an indication of the nationalities of the parties; (4) the names and nationalities of the arbitrators already appointed, if any; (5) the names of any institutions or persons that the parties had considered selecting as appointing authority but which have been rejected; (6) a power of attorney evidencing the authority of the person making the request; and (7) payment of the non-refundable administrative fee of Euro 750 to the PCA.

[5] For example, in a case, the arbitration clause provided that the proceedings would be "conducted under the Arbitration Rules of United Nations Commission on International Trade Law-UNCITRAL, in effect on the Effective Date and as administered by the London Court of International Arbitration". The claimant requested that the PCA Secretary-General designate an appointing authority to decide a challenge. The PCA Secretary-General appointed the London Court of International Arbitration as the appointing authority.

Annex

Growth in the PCA appointing authority cases since 1976